THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.17042 OF 2002

-

ORDER:

This Writ Petition is filed aggrieved by the action of the respondents in invoking the Bank Guarantees furnished by the 1st petitioner along with its tenders in response to the tender notification dated 5.03.2002.

The 1st petitioner claims to be a registered special class Contractor with the department of the Roads and Buildings. The 1st respondent- Superintending engineer (R&B), APHM & ECRP, issued a tender notification inviting tenders for widening and strengthening of Mydukur to Tadichearla Road from KM 50/0 to 57/0 and KM 57/0 to 65/0 under Package Nos.28-C and 28-D respectively. The 1st petitioner submitted its tenders, furnishing the required security as specified in Clause 16.1 of the Instructions to Bidders (ITB), by way of two Demand Drafts i.e., BG.No.2002/0015 for Rs.2,92,000/- and BG.No.2002/0016 for Rs.3,34,000/- issued by the Andhra Bank, Nandyal, respectively, in respect of the above said two packages. It is not in dispute that as per the tender schedule, bids were opened on 9.04.2002 and finalized.

Thereafter, the1st petitioner by letter dated 1.05.2002 informed the 1st respondent-Superintending Engineer, that the bids submitted by it on 9.04.2002 were tampered by some unknown persons and the Certificates of experience submitted by it were replaced, which act was beyond their control. While assuring that such instances will not be repeated as they would adopt fool proof precautions in future, the 1st petitioner requested not to initiate any punitive action against it keeping in view its good record of work done in the Department. It is not in dispute that the bids of the 1st petitioner were rejected as non-responsive in terms of Clause No.37.1 of 'ITB'. Subsequently, the 1st petitioner made a request to return the Bank Guarantees furnished by it claiming that since its bids were rejected under Clause 37.1 of 'ITB', they are entitled for return of the Bank Guarantees. The 1st petitioner

states that in pursuance of the said request, the 2nd respondent-Chief Engineer, vide memo dated 31.07.2002 directed the 1st respondent-Superintending Engineer, to act in terms of Clause 16.4 of 'ITB' and return the bid security furnished by the 1st petitioner. In spite of that the 1st respondent addressed a letter dated 13.08.2002 directing the 4th respondent – Pay & Accounts Officer, Telugu Ganga Project, to invoke the Bank Guarantees furnished by the 1st petitioner. Consequently, the Bank Guarantees furnished by the 1st petitioner were invoked and the 5th respondent-Andhra Bank, released the amounts covered by the two Bank Guarantees to the tune of Rs.6,26,000/- (Rs.2,92,000/- + Rs.3,34,000/-). The said action of the respondents is under challenge in this Writ Petition, contending *inter alia*, that the invocation of Bank Guarantees is contrary to the terms and conditions of the tender as well as the conditions of the Bank Guarantee. The 1st petitioner contends that since there was no concluded contract between the parties, the respondents 1 to 4 are not entitled to invoke the Bank Guarantees. It is further contended that as per the conditions stipulated, the Bank Guarantees are liable to be invoked only on the happening of any of the two conditions mentioned thereunder, and since none of the said conditions exists, the 5th respondent – Bank, ought not to have released the amount covered by the Bank Guarantees.

The 1st respondent-Superintending Engineer filed a counter-affidavit stating that the bids submitted by the 1st petitioner were opened on 9.04.2002, and when the Certificate of experience produced by the 1st petitioner was referred to the Executive Engineer, PWD, Bilaspur, for confirmation, the Executive Engineer, PWD, Bilaspur, informed that the Experience Certificate has not been issued by their Office at all. In the circumstances, as per Condition 37.1 of 'ITB' the 2nd respondent - Chief Engineer, rejected the bids of the 1st petitioner, since the Certificate of experience produced by it was found to be not genuine. Subsequently, when the 1st petitioner by letter dated 23.05.2002 requested return of the bid security, the 1st respondent-Superintending Engineer, by letters dated 7.06.2002 and 23.07.2002, sought clarification from the 2nd respondent, Chief Engineer. In response, the 2nd respondent by letter dated 31.07.2002 requested the 1st respondent to take necessary action in accordance with Condition 16.4 of 'ITB'. Accordingly, the bid security furnished by the 1st petitioner were submitted to the 4th respondent - Pay &

Accounts Officer, T.G.P. Cuddapah for encashment in terms of G.O.Ms.No23 dated 5.03.1999. The 1st respondent while categorically denying the plea of the 1st petitioner that certain unforeseen instances took place in the premises of the Office of the respondent, stated that no complaint or representation was received in that regard, and that police security was also arranged on 9.04.2002 i.e., on the date of opening of the tenders.

The 5th respondent- Bank, filed a separate counter-affidavit stating that as per the terms of the Bank Guarantees in question, they were valid up to 22.08.2002, and since invocation was made by the respondent No.4 within the validity period, the amounts covered by the Bank Guarantees were paid by way of Demand Drafts, and the said fact was informed to the 2nd petitioner – S. Rajeshwar Reddy, at whose instance the Bank Guarantees were issued. The said Rajeshwar Reddy vide letter dated 7.09.2002 promised to pay the entire amount of Bank Guarantees, within one month.

I have heard the learned counsel for both the parties and perused the material on record.

For proper appreciation of the controversy involved, it is necessary to note Condition No.16.0 of 'ITB', which runs as follows:

"INSTRUCTIONS TO BIDDERS (ITB)

16.0. Bid Security.

16.1 The Bidders shall furnish, as part of his Bid, a Bid security in the amount as shown in column 4 of the table of ITB for this particular package. This bid security shall be in favour of Pay and Accounts Officer, T.G. Project, Cuddapah and may be in one of the following forms.

A Bank Guarantee issued by a Nationalized/scheduled Bank located in India or a Bank abroad acceptable to the Employer in the form given in Section 8 or another form acceptable to the employer or Certified cheque, Bank Draft or Letter of Credit in favour of Pay and Accounts Officer, Cuddapah payable at Cuddapah.

16.2 Bank Guarantee (and other instruments having fixed validity) issued as security for the bid shall be valid for 45 days beyond the validity of the bid.

16.3 Any bid not accompanied by an acceptable Bid Security and not secured as indicated in Sub-clauses 16.1 and 16.2 above shall be rejected by the Employer as non-responsive.

16.4 The bid Security of unsuccessful bidders will be returned within 28 days of the end of the bid validity period in sub-cause 15.1.

16.5 The Bid security of the successful bidder will be discharged when the bidder has signed the Agreement and furnished the required performance Security.

16.6 The Bid Security may be forfeited.

a. if the Bidder withdraws the bid after Bid opening during the period of Bid validity.

b. If the Bidder does not accept the correction of the Bid price, pursuant to Clause 27, or

c. In the case of successful bidder, if the Bidder fails within the specified time limit to

I. sign the agreement, or

II. furnish the required performance security.“

On a reading of the above conditions, it is clear that the bid security of the unsuccessful bidders will be returned within 28 days of the end of the bid validity period. However, the bid security is liable to be forfeited in the circumstances specified in Clauses (a) to (c) of Condition No.16.6.

In the case on hand, the bids submitted by the 1st petitioner were rejected on the ground that the Certificate of experience produced by it with regard to similar works and quantities was found to be not genuine. It is true that the same amounts to ‘fraudulent practice’ as defined under Condition No.37.1 (a) (i) of ITB and on that ground the bids are liable to be rejected. The 1st petitioner does not dispute the said fact, however, contends that rejection of the bids on the said ground cannot result in forfeiture of the bid security. It is contended that Condition No.16.6, which is the only Clause for forfeiture of bid security does not attract to the facts of this case, and therefore, it is not open to the respondents to invoke the Bank Guarantees furnished towards bid security.

He points out that the ground on which the 1st petitioner’s bids were rejected does not fall within any of the Conditions specified in Clauses (a) to (c) of Condition No.16.6.

However, the learned Government Pleader appearing for the respondents while placing reliance upon G.O.Ms.No.23, I & CAD (PW:Cod) Department, dated 5.03.1999, which provides for tender procedure and other allied matters relating to A.P. Public Works Department, contends that once it is found that the tenderer made a false representation in the statement submitted in proof of the qualification requirement, it is open to the respondents to forfeit the security deposit invoking Clause 60 (a) of Preliminary Specifications to A.P. Standard Specifications.

The learned Government Pleader further contended that the Writ Petition itself is not maintainable, since the claim of the 1st petitioner arises out of the alleged breach of contract.

There can be no dispute about the well-settled legal principle, that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. However, as held by the Apex court in ***ABL International Ltd., v. Export Credit Guarantee Corpn. of India Ltd***, there is no absolute bar with regard to entertaining such a Writ Petition in case it does not involve serious disputed questions of fact which require consideration of evidence and merely the issue relates to interpretation/meaning of documents involved. In the above decision, while extensively referring to the ratio laid down in ***Kumari Shrilekha Vidyarthi v. State of U.P.***, it was held that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligation, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution, and in such circumstances, there should not be any inhibition to grant the relief under Article 226 of the Constitution of India.

As noted above, in the case on hand, there is absolutely no dispute about the fact that the 1st petitioner was disqualified and the tenders submitted by it were rejected on the ground that the Certificate of experience submitted by it was found to be not genuine. However, the only question that falls for consideration is, whether the bid security furnished by the 1st petitioner can be forfeited on the ground that the 1st petitioner has indulged in fraudulent practice.

On a reading of condition No.16.0 of 'ITB', it is to be noted that the Bank

Guarantees furnished by the 1st petitioner are not for performance of the contract, but they are for the purpose of ensuring that the bidder did not withdraw his bid during the period of bid validity, and in case of successful bidder he did not sign the agreement or fail to furnish the performance security within the specified time limit. Hence, undoubtedly, the amount of Bank Guarantees were to be paid by the Bank on demand by the respondents only on fulfillment of one of the conditions specified under Condition No.16.6. As a matter of fact, the Bid Security/ Bank Guarantee which was furnished in the prescribed *pro-forma* also contained the very same stipulations as mentioned under Condition No.16.6 of 'ITB'. The relevant portion from the Bid Security/ Bank Guarantee may be extracted hereunder.

> " THE CONDITIONS of this obligation are:
>
> 1. If after Bid opening the bidder withdraws his bid during the period of Bid validity specified in the Form of Bid;
>
> 2. If the Bidder having been notified of the acceptance of his bid by the employer during the period of Bid validity;
>
> a. fails or refuses to execute the Form of Agreement in accordance with the Instruction to Bidders, if required, or
>
> b. fails or refuses to furnish the Performance Security, in accordance with the Instruction to Bidders, or
>
> c. does not accept the correction of the Bid Price pursuant to Clause 27;
>
> We undertake to pay to the Employer up to the above amount upon receipt of his first written demand, without the Employer having to substantiate his demand, provided that in his demand the Employer will note that the amount claimed by him is due to him owning to the occurrence of one or any of the three conditions, specifying the occurred condition or conditions."

In the present case, admittedly, none of the above said conditions has been fulfilled. The 1st petitioner has neither withdrawn its bids during the period of bid validity, nor was he a successful bidder who failed to sign the agreement or furnish the required performance security. In the circumstances, I find force in the submission of the learned counsel for the petitioners that neither condition No.16.6 of 'ITB' nor the conditions specified under the Bank guarantee were attracted.

The Apex Court as well as this Court in a *catena* of decisions held that if the enforcement of Bank Guarantee is in terms of guarantee, then the Courts must not interfere. However, the interference of the Court is permissible, if the invocation of the Bank Guarantee is against the terms of the guarantee or if there is any fraud. In

the instant case, though there is no allegation of any fraud, as noted above, obviously the invocation was against the terms of the guarantee.

The learned Government Pleader could not point out any clause under 'ITB' which entitles the respondents 1 and 2 to forfeit the bid security on the ground that the tenderer was disqualified on account of indulging in fraudulent practice. The only provision pointed out by the learned Government Pleader is Clause 3.02.04 of the guidelines prescribed under G.O.Ms.No.23, I & CAD (PW:Cod) Department, dated 5.03.1999, which runs as under:

> " **3.02.4** Even though the tenderer meets the above qualification criteria, he/she is subject to be disqualified if he/she is found to have misled or made false representation in the forms, statements submitted in proof of the qualification requirements or record of poor performance such as abandoning works not properly completed in the contract, inordinate delays in completion, litigation history and or financial failures and/or participated in the previous tendering for the same works and had quoted unreasonably high bid prices. In addition to the above, even while execution of the work, if found that the Contract had produced false/fake certificates of experience, he/she will be blacklisted and work will be taken over invoking clause 60(a) of PS to APSS."

As can be seen, the above clause is in two parts. The first part provides for disqualification of the tenderer on the ground that he or she made a false representation in the forms or statements submitted in proof of the qualification requirements, in spite of the fact that such tenderer has met the qualification criteria. The second part applies to a case where the contract has been awarded and the work was in execution. At that stage if it is found that the contractor had produced a false/fake certificate of experience, he/she will be blacklisted and the work will be taken over invoking Clause 60 (a) of the PS to APSS, which provides for termination of the contract and forfeiture of the deposits.

In the present case, the second part of Clause 3.02.4 does not attract, since there was no concluded contract. Obviously, the first part of the Clause is attracted and in terms of the said Clause, the 1st petitioner was disqualified on the ground that he produced a false Certificate of experience. Hence, I am unable to agree with the submission of the learned Government Pleader that Clause 60 (a) of PS to APSS can be invoked to forfeit the bid security furnished by the 1st petitioner.

For the aforesaid reasons, the action of the respondents in invoking the Bank

Guarantees is not in accordance with the terms and conditions of the 'ITB' and it is contrary to the terms of the Bank Guarantee. Therefore, the Writ Petition is allowed as prayed for declaring that the action of the respondents is arbitrary and illegal, and accordingly, there shall be a direction to the respondents to return the Bank Guarantees furnished by the 1st petitioner. No costs.

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(G. ROHINI, J.)

January 4, 2006.

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L.R. Copy to be marked.

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.17042 OF 2002

January 4, 2006.

Between:

M/s SANICONS, a registered

Partnership Firm, represented by

Its Managing Partner Sri U. Ramesh and

Another. .. Petitioner.

And

Government of A.P., represented by

Superintending engineer (R&B) APHM & ECRP,

Cuddapah Circle, Cuddapah and four others. .. Respondents.

***THE HON'BLE Ms. JUSTICE G. ROHINI**

+WRIT PETITION No.17042 OF 2002

% 04/01/2006

M/s SANICONS, a registered

Partnership Firm, represented by

Its Managing Partner Sri U. Ramesh and

Another. .. Petitioners.

Vs.

$ Government of A.P., represented by

Superintending engineer (R&B) APHM & ECRP,

Cuddapah Circle, Cuddapah and four others. .. Respondents.

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>HEAD NOTE:

!COUNSEL FOR THE PETITIONER: Mr. J. Prabhakar

^ COUNSEL FOR THE RESPONDENT: Govt. Pleader for R & B

Sri. K. Vijayakumar Reddy (for R5)

?CASES REFERRED:

1. 2004(3) SCC 553.

2. 1991 (1) SCC 212.